Malaya Cafe Bar & Restaurant v Shaw Brothers Ltd

HIGH COURT (SINGAPORE) — DISTRICT COURT APPEAL NO 76 OF 1982
SINNATHURAY J
27 DECEMBER 1990

Landlord and Tenant — Monthly tenancy of premises subject to the Control of Rent Act (Cap 58, 1985 Ed) — No prohibition against assigning or subletting — Constitution of appellant firm had changed over time — Whether notice to quit addressed to original tenant served on the appellant firm valid — Whether deed of assignment to which original tenant was not a party gave the present partners of the appellant firm any interest in the tenancy — Receipt of notice to quit addressed to original tenant admitted in appellants' defence — Whether it followed from such an admission that the notice to quit was a valid notice to terminate the tenancy

The appellants, the Malaya Cafe Bar & Restaurant, were sued as a firm. At the time of the issuance of the writ, the firm was a partnership comprising three partners ('the present partners'). The respondents were the owners of the premises. In July 1950, the respondents granted one Mr Su ('Su') a monthly tenancy of the premises, and Su carried on business on the premises as a sole proprietor in the name and style of 'Malaya Cafe & Bar'. There was no prohibition on Su against assigning or subletting the premises. Su subsequently brought in other partners to the business and retired from the partnership some years later. In April 1979, the business of Malaya Cafe Bar & Restaurant was sold to one of the present partners and the monthly tenancy of the premises was assigned by a deed of assignment to the present partners.

In May 1980, when the respondents came to know that some renovation works were in progress on the premises, they made a search and discovered that Su was no longer with the firm. The respondents gave a notice to quit addressed to Su and served on the appellants as the firm in possession of the premises. The respondents commenced proceedings against the appellants claiming that the appellants were trespassers in unlawful occupation of the premises.

The two issues were whether there was a valid notice to quit to terminate the tenancy and whether by the deed of assignment, the appellants were lawfully the tenants of the premises.

The district judge at first instance held that the notice to quit addressed to Su and served on the appellants was a valid notice to quit and that the partners who purported to assign the tenancy to the present partners had no right in the tenancy which they purported to assign as Su had abandoned the tenancy when he retired from the partnership.

Held, allowing the appeal:

(1) Although the appellants in their defence admitted receiving the notice to quit addressed to Su, that did not mean that it was a valid notice as the appellants had categorically denied in their defence that the tenancy had been terminated by the respondents.

(2) The respondents did not produce any evidence (other than the notice to quit) that the tenancy had been properly terminated. The rent receipts by the respondents had been issued in the name of 'Malaya Cafe', and the change of name of the firm from the original 'Malaya Cafe & Bar' to 'Malaya Cafe Bar & Restaurant' did not cause the respondents to investigate or make enquiries. Therefore, the conclusion was that the respondents were not concerned as to who were the persons who managed or owned the business of the firm and never considered Su to be their only tenant and had treated the appellants as actual tenants of the premises. The notice to quit addressed to Su and served on the appellants was therefore not a valid notice to quit and the tenancy of the appellants was never determined. The appellants were therefore not unlawful trespassers on the premises.

(3) There was no prohibition against Su assigning or subletting the premises. The respondents could at no time have prohibited Su from assigning or subletting the tenancy. Further, there was no requirement that any such change had to be effected by deed. As such when Su first took in partners, the partners acquired an interest in the tenancy because the tenancy of the premises was an asset of the partnership business. When Su left the partnership, he ceased to have an interest in the tenancy but the partners who continued in the business remained on the premises as tenants. There was, therefore, no legal impediment to the assignment of the tenancy by the then partners in April 1979 to the present partners.

Cases referred to

1 *Eng Chuan & Co & Ors* v *Four Seas Communications Bank Ltd* [1982] 2 MLJ 81 (refd)
2 *Lai Seng Fook* v *Tang Kong Low* [1978] 1 MLJ 158 (distd)
3 *Chartered Bank (M) Trustee Ltd* v *Abu Bakar* [1957] MLJ 40 (distd)
4 *Champion Motors (M) Ltd* v *Leong Siew Kwan* [1968] 2 MLJ 31 (refd)

Legislation referred to

Control of Rent Act (Cap 58, 1985 Ed) s 27(a)
Probate and Administration Act (Cap 251, 1985 Ed) s 37(1)

Appeal from: DC Summons No 1438 of 1981 (District Court, Singapore)

G Raman for the appellants/defendants.
Kirpal Singh for the respondents/plaintiffs.

Cur Adv Vult

Sinnathuray J: This is an appeal against the judgment of the learned district judge granting possession of the business premises known as No 27 Stamford Road, Singapore ('the premises') to the respondents, Shaw Brothers Ltd, who at the material time were the owners of the premises. It is common ground that the Control of Rent Act (Cap 58, 1985 Ed) applied to the premises which have since been compulsorily acquired by the State.

The appellants, Malaya Cafe Bar & Restaurant, were sued as a firm. At the time of the issue of the writ, the firm was a partnership with three partners, Mok Ah Leong, Mok Pui Chan and Mok Lai Fong ('the present partners'). In order to understand the issues involved in this appeal, it is necessary for me to give in some detail the history of the ownership of the firm which carried on business on the premises and its relationship with the landlords, the respondents.

Sometime in July 1950, the respondents granted one Su Jew Kheng ('Su') a monthly tenancy of the

premises. Su carried on business on the premises as a sole-proprietor in the name and style of 'Malaya Cafe & Bar'. For the rents paid by Su, the respondents issued rent receipts in the name of 'Malaya Cafe'. Su was not prohibited against assigning or subletting the premises.

Su carried on business as a sole proprietor on the premises for 15 years. Then, in February 1965, he brought in Ho Wah Hong, Ho Toon Jin and Ho Choo Chong as partners and Malaya Cafe & Bar became a partnership business. The rents were paid by the partnership and the respondents continued to issue receipts in the name of 'Malaya Cafe'.

In subsequent years, there were several changes in the composition of the partnership business:

(a) in June 1965, Ho Choo Chong withdrew and Shie Chong Hwa joined the partnership;
(b) in March 1967, Shie Chong Hwa left the partnership and Ho Kwong took his place;
(c) in February 1969, Ho Wah Hong, Ho Toon Jin and Ho Kwong retired from the partnership, and Su took in four new partners, Lee Tuck Chong, Lim Thong Cheng, Low Chen Kiong and Ting Heng Sea; with the reconstruction of the business, the name of the firm was changed to 'Malaya Cafe Bar & Restaurant';
(d) in December 1978, Su withdrew from the partnership, leaving the business in the hands of the four partners referred to in (c) above; and
(e) in April 1979, pursuant to a sale and purchase agreement ('the agreement') dated 19 April 1979, Mok Ah Leong bought from the four partners the business of Malaya Cafe Bar & Restaurant for $44,000; and on 30 April 1979, the four partners assigned to the present partners the monthly tenancy of the premises at the rent of $245.45.

At the trial, though no evidence was given by the respondents, it was claimed on their behalf that they were not aware of these changes in the ownership of the business of the appellants. This is indeed surprising. To paraphrase what Lord Diplock said in *Eng Chuan & Co & Ors* v *Four Seas Communications Bank Ltd*[1] at p 82, it defies credulity that for nearly 30 years the respondents did not know who were the persons who throughout that period were carrying on business in the name of the appellants on the premises. However, right up to April 1980, the respondents were quite content to issue rent receipts in the name of Malaya Cafe; this they did, knowing that the rents paid by the appellants were drawn on partnership cheques in the name of 'Malaya Cafe Bar & Restaurant'.

The case for the respondents was that sometime in May 1980, they came to know that some renovation works were in progress on the premises. Upon a search made at the Registry of Businesses, the respondents discovered for the first time that the present partners of the firm, who were unknown to them, owned the business of 'Malaya Cafe Bar & Restaurant', and that Su was no longer with the firm.

The respondents, through their solicitors, enquired of the appellants as to the whereabouts of Su but received no reply. Their solicitors then sent the following letter and notice to quit:

KS/1PS/2092/80
28 October 1980

Managing Partner
M/s Malaya Cafe Bar & Restaurant
27 Stamford Road
Singapore

Registered

Dear Sir

No 27 Stamford Road

We herewith serve on you as the firm in occupation of the premises and purporting to pay rent for the premises a notice to quit addressed to Su Jew Kheng.

Yours faithfully

enc

KS/1PS/2092/80

Su Jew Kheng Esq
M/s Malaya Cafe Bar & Restaurant
27 Stamford Road
Singapore

Registered

Notice to quit
Shop No 27 Stamford Road
Singapore

As solicitors for Shaw Brothers Ltd, the owners of the above premises, we hereby give you notice to quit and deliver up to our clients vacant possession of the above-stated premises on 30 November 1980 or on the expiration of the month of your tenancy which will expire next after the end of one calendar month from the date of service of this notice.

Dated 28 October 1980.

Solicitors for Shaw Brothers Ltd

cc Shaw Brothers Ltd

Another notice to quit of the same date was served on the Chief Justice purporting to terminate the monthly tenancy granted to Su. This was done by the solicitors, presumably, because the respondents thought that Su had died intestate and his estate was vested in the Chief Justice by operation of law by virtue of s 37(1) of the Probate and Administration Act (Cap 251, 1985 Ed).

On 8 November 1980, solicitors for the appellants in their reply took the stand that the appellants were the

tenants of the premises. The solicitors returned the notice to quit addressed to Su.

The respondents then commenced the present proceedings. In the statement of claim, they claimed possession of the premises on the ground that the appellants were trespassers unlawfully in occupation of the premises. The appellants in their defence averred that they were the contractual tenants in the premises as assignees of the tenancy by virtue of the deed of assignment of 30 April 1979. They also denied that the contractual tenancy of the premises had been lawfully terminated by the respondents.

Unfortunately, there was very little evidence given at the trial. The respondents called only one witness, See Yoke Choon, a senior technical officer from the Public Works Department. He gave evidence that in July 1990, on a written complaint made by solicitors for the respondents that 'considerable changes' had been made to the premises, an inspection was carried out at the premises. After that, the department wrote to the respondents' solicitors that they found only 'some minor repairs' done to the premises. All this evidence was of no use to the respondents; nor was it relevant for the determination of the issues raised in the pleadings.

Some assistance, however, was to be had from the only other witness at the trial who gave evidence for the appellants. Mok Ah Leong, one of the present partners, testified that before he entered into the agreement and deed of assignment, he had made enquiries from the previous tenant and had been told that there was no prohibition against the assignment of the premises. Later, after he took over the premises, he paid the monthly rents to the respondents by way of cheques. They were always accepted by the respondents.

On these facts and matters pleaded, there were two issues for determination at the trial. One was whether there was a valid notice to quit to terminate the tenancy of the premises. The other was whether, by the deed of assignment, the appellants were lawfully the tenants of the premises, either by assignment or estoppel.

On the first issue, the learned district judge decided that the notice to quit addressed to Su was a valid notice, and that it was properly served on the appellants' solicitors because the appellants were in control of the premises, that they were holding it for Su, the absent tenant of the premises. He was of the view that the appellants had paid the rents for the premises 'as agents of the tenants'. He cited *Lai Seng Fook* v *Tang Kong Low*[2] as authority for the proposition that service of a notice to quit on an agent was a notice to the principal.

On the second issue, the learned district judge acceded to the submission made for the respondents that as there was no evidence that Su had ever assigned his tenancy when Su withdrew from the partnership on 31 December 1978, he had abandoned the tenancy which the respondents had granted to him in 1950. As regards the partnerships which Su had entered into with the several persons in the intervening years, he found that none of the partners had acquired any rights to the tenancy of the premises. Therefore, when the four partners purported to assign the tenancy of the premises to the present partners, they had no right in the tenancy which they could assign. The learned district judge found support for his decision in the dicta of Knight and Whitton JJ in *Chartered Bank (M) Trustee Ltd* v *Abu Bakar*.[3] This was a case where the respondent, in an action for recovery of possession of a business premises, had pleaded in his defence that he was an agent or licensee of an absent tenant who had absconded to India and had, in effect, abandoned the premises. The Court of Appeal, in a majority judgment, found in favour of the appellants, the landlords, on the grounds that the respondent had failed to make good his defence. Therefore, on the facts, this case has no application to the present case.

The appeal was a re-hearing of the two issues and counsel for the parties made substantially the same submission they had earlier put forward in the court below.

Counsel for the appellants challenged the validity of the notice to quit. He said that the respondents had not discharged their burden of proof as there was no evidence that the notice to quit had been served on Su. Inasmuch as the respondents only recognized Su as their tenant, the respondents must prove that the notice had in fact been brought to the knowledge of the tenant: counsel relied on *Champion Motors (M) Ltd* v *Leong Siew Kwan*.[4] He submitted that the tenancy not having been properly terminated, the appellants were not unlawfully in occupation of the premises; they were not trespassers.

Another submission for the appellants was that the notice to quit should have been issued in the name of the appellants and served on the present partners as was done in the *Eng Chuan* case,[1] which got to the Privy Council. Counsel said that the learned district judge ought not to have relied on the case of *Lai Seng Fook* v *Tang Kong Low*[2] as the present case is different from that case. He said, and I agree with him, that in this case no evidence had been adduced by the respondents in the trial court to lay the foundation for a submission that either the appellants or the present partners were or had acted as the agents of Su. On the contrary, the facts show that the appellants were the tenants of the premises and were so accepted by the respondents. It follows, therefore, that even if there had been a notice to quit

properly issued and served on the appellants whose tenancy of the premises would be terminated, they would become statutory tenants by operation of law under s 27(a) of the Control of Rent Act (Cap 58, 1985 Ed). The appellants would then be accorded the protection under that Act to remain in possession of the premises as statutory tenants thereof.

It is not clear in the written submission what the argument is for the respondents on this first issue. It was said that the respondents had terminated the tenancy of Su by serving the notice to quit addressed to Su on the appellants as the persons in occupation of the premises. This notice was received by the appellants and handed to their solicitors. And it was emphasized that there is no allegation in the defence that the notice to quit was not a valid notice to terminate the tenancy of Su. From what was said, it seems to me that it was contended that the notice to quit addressed to Su was a valid notice because it had been admitted in the defence that it was received by the appellants who were in occupation of the premises.

This submission on the pleadings is, in my view, untenable. It is true that the appellants in their defence admitted the receipt of the letter and notice to quit referred to above. But they also did in para 13 of the defence categorically plead that the appellants' contractual tenancy of the premises had not been determined by the respondents. It is, in my view, beyond argument that by pleading in this way, the appellants gave notice to the respondents that it was for them to prove at the trial that the notice was a valid notice to terminate the tenancy of the premises.

Besides the notice to quit referred to above, the respondents did not at the trial produce any evidence to make good their claim that the tenancy of the premises had been properly terminated. Nor was there any evidence that Su had left the premises in the charge of the present partners. So, the proposition relied on by the respondents that where a tenant does not personally occupy the premises, the person whom the tenant leaves in physical possession to manage and control the premises may be deemed his agent for receiving service of a notice to quit does not apply to this case. Moreover, there was no evidence that the respondents had at any time only considered Su as their tenant.

In the present case, the rent receipts were issued in the name of 'Malaya Cafe'. If what the respondents said about recognizing only Su as their tenant is true, one would expect them to issue the receipts in his name rather than in the firm's name. Even the change in the name of the firm from the original 'Malaya Cafe & Bar' to 'Malaya Cafe Bar & Restaurant' did not cause them to investigate or make enquiries. I am, therefore, driven to the inescapable conclusion that the respondents never considered Su to be their only tenant and none other. The respondents were content to continue receiving rent, as they did over the years, from 'Malaya Cafe' regardless what the composition of the firm might be.

So, there is strong evidence in the rent receipts that the respondents treated the appellants as the actual tenants of the premises. The respondents were not concerned as to who the persons were who managed or owned the business of the firm. I agree with counsel for the appellants that the tenancy of the appellants was never terminated. Even as regards the present partners, they were lawfully in occupation of the premises. They were assignees of the tenancy who had earlier bought the business carried on in the premises. Their tenancy too has not been terminated. Accordingly, neither the appellants nor the present partners were trespassers on the premises.

Though what I have said is sufficient to dispose of this appeal, I shall now deal with the second issue. Essentially, the submission for the respondents was that the deed of assignment was bad in law because Su had not been made a party to the deed by which the four partners had purportedly assigned the tenancy to the present partners. The argument was that as Su had not assigned the tenancy to the four partners, the latter were not tenants, and therefore they could not assign the tenancy to the present partners.

I am unable to agree with this submission. On the facts, I accept the submission for the appellants that at all material times the appellants, first as a sole proprietorship and later as a partnership, were lawfully on the premises. So too were the present partners since 30 April 1979 by virtue of the deed of assignment. In my view, there was no legal impediment for the four partners of the firm to assign the tenancy to the present partners. Su was not a party to the deed as he was then no longer a partner in the firm.

As for the right to tenancy which had vested in Su in June 1950 as a sole proprietor of the firm, I agree with counsel for the appellants that when Su took in partners from early 1965, the partners would have acquired an interest in the tenancy because the tenancy of the premises was an asset of the partnership business. There was no reason whatsoever why this should not be so because between themselves there could be no legal objection to them acquiring an interest in the tenancy. Therefore, it would follow that when Su left the partnership, he merely ceased to have an interest in the tenancy of the premises, but not in the case of the four partners who continued to remain in the premises as tenants thereof.

More importantly, the valuable right which Su had in respect of the tenancy was that there was no prohibi-

tion against him assigning or subletting the premises. In my view this right is the determining factor in this case. Whether or not the respondents were aware of the changes in the partnership of the business of the appellants, is an immaterial consideration. The fact of the matter is that the respondents could at no time have prohibited Su from sharing the tenancy of the premises with his partners, and later, assigning it to them altogether before he withdrew from the partnership.

Furthermore, there is no requirement, in my judgment that these changes had to be effected by deed. On this matter, there is an observation by the Privy Council in the *Eng Chuan* case[1] which I reproduce below. Lord Diplock said at p 82:

> ... The transfer of the tenancy from Lee Siew Pan to the personal appellants would *not* have been by way of *assignment* which, as D'Cotta J recognized, would have to be made *by deed*; but *that would be an unusual and expensive way of effecting a change of tenant under an oral monthly tenancy*, when all that was needed was a surrender by Lee Siew Pan of his monthly tenancy to take effect on 31 December 1953 when he retired from the partnership (or at the end of any month thereafter) and the grant by the owner of the freehold, Chin Hwa Hin, of a fresh oral monthly tenancy to the remaining three partners in the firm, the personal appellants. (Emphasis added.)

For all these reasons, the appeal is allowed with costs to the appellants, here and below. The security for costs is to be paid out to the appellants' solicitors.

Appeal allowed.

Solicitors: G *Raman & Partners; Kirpal Singh & Co.*

Reported by *Teoh Ai Lin*

Re EG Tan & Co (Pte); Wong Tui San & Ors v Chase Manhattan Bank NA

HIGH COURT (SINGAPORE) — COMPANIES WINDING UP NO 212 OF 1986
LAI KEW CHAI J
31 OCTOBER 1990

Companies and Corporations — Charges — Whether share memorandum created fixed or floating charge — Shares kept in designated safe on chargor's premises

Under an agreement entitled Share Memorandum ('the share memorandum') between EG Tan ('the company'), a firm of stockbrokers, and the respondents, a bank that had extended to the company banking facilities, the company agreed to deposit in a designated safe shares as security. Any movement of share certificates in and out of the designated safe would be recorded. The safe was installed in the company's premises and marked with the respondents' name. The applicants as liquidators of the company were seeking declarations from the court that the respondents had no interest in the shares other than as unsecured creditors of the company, that the relevant share memorandum created a floating charge over the shares and that this charge was void for non-registration under the Companies Act (Cap 50, 1990 Ed).

Held, allowing the applicants' application:

(1) By cl 1 of the share memorandum, the company had charged the shares deposited or to be deposited and any substituted shares as continuing security for the banking facilities granted by the respondents. It was clear that the rights which attach to the shares or choses in action and not mere share scrips as such, are to be charged by way of security to the respondents. As such there was no intention to create a pledge over them.

(2) As far as the shares kept in the designated safe were concerned, the company was not put out of them and was free or would have been free to deal with them. They could have given good title over them to any bona fide purchaser provided such disposal was carried out in the ordinary course of business. All the characteristics of a floating charge were therefore present here.

Cases referred to

1 *Re Lin Securities Pte* [1988] 2 MLJ 137 (folld)
2 *Re City Securities Pte* [1990] 2 MLJ 257 (folld)
3 *Re Panama, New Zealand & Australian Royal Mail Co* (1870) 5 Ch App 318 (refd)
4 *Harrold* v *Plenty* [1901] 2 Ch 314 (refd)
5 *Stubbs* v *Slater* [1910] 1 Ch 632 (refd)
6 *The Colonial Bank* v *John Cady and John Charles Williams* (1890) 15 App Cas 267 (refd)
7 *Carter* v *Wake* (1877) 4 Ch D 605 (refd)
8 *Wrightson* v *McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807 (refd)
9 *Hilton* v *Tucker* (1888) 39 Ch D 669 (refd)
10 *Askrigg Pty Ltd* v *Student Guild of the Curtin University of Technology* [1990] 1 ACSR 40 (refd)

Timothy Lloyds QC (*Susan Kong* with him) for the applicants.

JM Chadwick QC (*Eugene Lim* with him) for the respondents.

Cur Adv Vult